Supreme Court, U.S.
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No. 03-____

In The

Supreme Court of the United States

OCTOBER TERM, 2003

LOUIS R. KOERNER, JR.,
Petitioner

v.

THE GARDEN DISTRICT ASSOCIATION, MICHELLE O. LANDRIEU, PAUL MAY, AND THE CITY OF NEW ORLEANS,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION OF LOUIS R. KOERNER, JR. FOR A WRIT OF CERTIORARI

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March 15, 2004

QUESTIONS PRESENTED

1. Does the decision of the United States Court of Appeals for the Fifth Circuit establish a conflict with this Court's jurisprudence as this case does not implicate the concerns that this Court relied upon in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *Colorado River v. United States,* 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) in order to justify a stay of proceedings in the courts of the United States, and does it also conflict with the decisions of the Second, Third, Fourth, Seventh, Ninth and Eleventh Circuits in *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988), *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), *Neufeld v. The City of Baltimore*, 964 F.2d 347, (4th Cir. 1992), *Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997), *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *Rindley v. Gallagher*, 929 F.2d 1552 (11th Cir. 1991)?

2. Did the failure to insist that the district court provide written reasons detailing compliance with this Court's mandatory standards for abstention conflict with *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *Colorado River v. United States,* 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) where this Court stated that the federal courts have an unflagging obligation to exercise their jurisdiction, unless some specific abstention criteria are present like, which criteria were carefully explained and analyzed by the Ninth Circuit in *United States v. Morros*, 268 F.3d 695 (9th

Cir. 2001) and does it also conflict with *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982) in that if there is to be abstention, the district court must state the specific facts upon which its decision is made?

3. Is there a difference in the standard of review between a determination that abstention may be appropriate which is reviewed *de novo* and the justification by the district court by reference to abstention factors, which is reviewed for abuse of discretion, so that in the absence of any analysis of the abstention criteria, the court of appeal should have reviewed *de novo* the granting of the stay by the district court as was done by the Ninth Circuit in *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996), *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), *Wallis v. Mock*, 2003 U.S. App. LEXIS 12668 (9th Cir. 2003) and in *Pallack v. Homestead Insurance Company*, 2003 U.S. App. LEXIS 7350 (9th Cir. 2003), so that its failure to do so established a conflict with the 9th Circuit.

PARTIES TO THIS PROCEEDING

Petitioner is Louis R. Koerner, Jr., plaintiff in the district court and appellant in the court of appeal.

Respondents are The Garden District Association, et al., defendants in the district court and appellees in the court of appeal.

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Appendix D – City of New Orleans Zoning Ordinance Excepts and Prescriptive Statute on Acquiring Non-Conforming Uses by Prescription 12a

Petitioner, Louis R. Koerner, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fifth Circuit appears at appendix A and is reported at 2003 U.S. App. LEXIS 21739 (5th Cir. La. 2004). The denial of rehearing *en banc* and the denial of panel rehearing (App. B) are not reported. The district court opinion appears at appendix C and is not reported.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on October 24, 2003. Rehearing *en banc* and panel rehearing were denied on December 16, 2003.

STATEMENT OF THE CASE

Petitioner, Louis R. Koerner, Jr., is an attorney at law who has practiced law in his house in the Garden District (New Orleans, Louisiana) since he purchased it in 1979. After practicing law continuously for almost twenty years, petitioner applied for a permit to establish a bed and breakfast for his house in 1997, which the City of New Orleans denied and the Board of Zoning Adjustment refused to overturn. Upon Koerner's appeal, the state courts affirmed the zoning decision stating that the entirety of the house had not acquired a non-conforming use although the law office was allowed under the zoning ordinance but granted no other relief. The Louisiana appeals court affirmed (726 So. 2d 435) but also held that Koerner had acquired a non-conforming use as to his number of employees and could employ up to five employees. This case became final on January 9, 1999 (The Louisiana Supreme Court denied writs on April 23, 1999).

Not satisfied by the denial of the bed and breakfast license

or by the fact that Koerner **never** utilized his home as a bed and breakfast and did not otherwise expand his nonconforming use, the City, encouraged by the GDA, filed a motion for contempt concerning Koerner's long-time use of the property as a law office even though no affirmative relief had been requested or granted to the City and even though there was no new use of the property. Unsurprisingly, the contempt motion was dismissed on the merits on March 20, 2000.

Again not satisfied by the dismissal of its contempt motion, but not taking an appeal, the City and other municipal officials retaliated against Koerner by retroactively revoking his homestead exemption without giving any reason,[1] issuing a criminal citation for failure to have an occupational license as an attorney, and refusing to issue an occupational license on the pretext that his home was not zoned to be the law office that had operated since 1979. The City also stated to all that inquired that Koerner was operating an illegal law office because he had non-resident employees, even though he was operating within the bounds set by the Louisiana appeals court.

In order to seek redress and surcease from the illegal activities of the City and its allies, Koerner filed a complaint (July 26, 2000) in federal district court against the City, its zoning administrator, the assessor (Betty Jefferson, sister of Rep. William Jefferson), and the Garden District Association seeking injunctive and declaratory relief and damages pursuant to 42 U.S.C. § 1983 for denial of equal protection and other

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[1] As the time of the revocation of his homestead exemption, The Jackson Avenue Foundation, of which Koerner was co-chairman and attorney, was in litigation with the assessor's daughter over the assessor's scheme to purchase historic property and then demolish it as a parking lot, had obtained injunctive relief, and was moving for a judgment of contempt for its violation.

violations of his constitutional rights.

Although the GDA was dismissed in an interlocutory ruling in December of 2001 (2001 U.S. Dist. LEXIS 21810; E.D. La 2001), the motions to dismiss of the City of New Orleans and Paul May individually and of Assessor Jefferson were denied on March 28, 2002 (2002 U.S. Dist. LEXIS 6306; E.D. La 2002). On October 12, 2002, the criminal action against Koerner in the Municipal Court for the City of New Orleans was dismissed for lack of subject matter jurisdiction. On January 24, 2003, Assessor Jefferson entered into a consent judgment reinstating Koerner's homestead exemption and refunding the amounts wrongfully paid in additional taxes.

In 2001, the Garden District Association filed a state-court petition for injunction to enjoin Koerner from using his house in a manner that violated the zoning.

On March 26, 2003, and after soliciting a motion to stay at the final pretrial conference, the district court ordered the matter stayed, stating that there are "state court issues that are intertwined with the issues presented to the Court in the above-captioned case."[2] The one-page decision contained no justification of the stay, no reference to the type of abstention relied upon, no citation to any law, nor any discussion of any of the abstention factors established by this Court and the courts of appeal. Koerner appealed to the United States Court of Appeal for the Fifth Circuit. The Fifth Circuit affirmed the lower court's decision to abstain under *Burford*. Its attempted justification for the lack of written reasons was the statement that "the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state proceeding were intertwined with the issues presented in

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[2] See Appendix C, 11a.

this matter. Considering the facts of the case and the contents of the motion to stay, the trial court's one-page order was found sufficient"[3]. Panel and *en banc* rehearing were denied.

A. The Consequences of the Decision Below

Importance of the Issue

The Fifth Circuit affirmed an order that permitted abstention without any reasoning, any citation to authority, even the type of abstention utilized, and without any discussion of the factors mandated to be considered before refusing to exercise the unflagging duty of the district court to exercise its jurisdiction. It permitted a district court to stay a case found troubling without justifying the exercise of its use of discretion.

This decision to affirm the district court's abstention under *Burford* conflicts with the decisions of this Court and other federal circuits and therefore threatens the uniformity of the jurisprudence concerning *Burford* abstention, the extent of the discretion of the district court, and whether the failure to articulate compliance with the abstention standard is an abuse of such discretion to be reviewed *de novo*.

B. Proceedings Below

The original complaint was filed in July 26, 2000, asserting constitutional and state claim claims and included a request for preliminary injunction prohibiting the defendants from:

1. Instituting groundless contempt proceedings or other civil or criminal proceedings against Koerner, the purpose of which is to wrongfully deprive him of his constitutional rights or discourage their assertion;

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[3] See Appendix A, 7a-8a.

2. To wrongfully deprive him of the benefit of his homestead exemption;

3. To assess his immovable property, 1204 Jackson Avenue, in a manner which constitutes a denial of equal protection;

4. To enforce or threaten to enforce unequally against him the occupational licensing law of the City of New Orleans.

The City's motion to dismiss or for summary judgment contending that Koerner's suit constituted an improper attempt to appeal the zoning decisions of the state court and that the court lacked subject matter jurisdiction were denied. *Koerner v. The Garden District Association*, 2002 U.S. Dist. LEXIS 6306 (EDLA 2002).

After the initial scheduling order, Koerner attempt to file a first amended complaint and jury demand, asking for the following relief, *inter alia*:

1. Declaring that defendants violated 42 U.S.C. § 1983 by denying plaintiff his right to the equal protection of the laws, procedural due process, substantive due process, and his property and property rights and threatened his liberty without due process.

2. Declaring that further judicial or administrative action against the use of 1204 Jackson Avenue was barred on account of the running of the applicable prescription of two years from May 1, 1997 for the non-conforming use of this property described in the letter of May 1, 1997 to Paul May and the diagram enclosed of the property and entering the appropriate judgment.

3. Declaring that further judicial or administrative action against the use of 1204 Jackson Avenue based on Koerner's use of the said property as a law office and offices of civic and

charitable associations without any limitation of percentage or number or character of employees is barred by res judicata on account of the failure of the City of New Orleans to file a reconventional demand or any other request for affirmative relief in the Koerner v. City of New Orleans litigation in Civil District Court for the Parish of Orleans.

On December 30, 2002, Koerner filed his first amended complaint revised in accordance with the order of Magistrate Judge Roby issued on December 26, 2002. Koerner asserted denial of equal protection of the laws, denial of procedural due process concerning the revocation of the homestead exemption and the filing of a meritless motion for contempt, denial of substantive due process, and intentional deprivation of civil rights by malicious civil and criminal proceedings in order to retaliate against the plaintiff. There were also state law claims.

Koerner has engaged in extensive written discovery and depositions to get the case ready for trial. It was during the February 20, 2003 pre-trial conference and just before trial that the district court suggested a stay motion to GDA counsel.

The federal case was stayed pending the state court's decision on injunctive relief, but this disposition in the state court does not finalize anything concerning Koerner's claims for damages arising from the meritless criminal and civil proceedings filed by the City that violated his constitutional rights. It cannot resolve the damage claim caused by the City's allegation that he operated his law office illegally nor the wrongful refusal by the City to issue to him an occupational license. The stay merely delays disposition in federal court.

Despite this, the Fifth Circuit affirmed the district court's abstention under the *Burford* doctrine. Rehearing *en banc* and panel rehearing were denied on December 16, 2003.[4]

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[4] See Appendix B, 9a-10a.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Court of Appeals, on an Important Federal Question, Conflicts with Decisions of This Court and with Those of Other Circuits.

A. The Issues as Framed by the Court of Appeal

According to the court of appeal:

> The only remaining claims in this matter are: (1) alleged constitutional violations pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance and the citation of Koerner for failing to have the requisite occupational law license; and (2) the City's defenses to those claims. The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding.
>
> Federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and abstention is the exception not the rule. *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993). However, a number of abstention doctrines have been recognized by the Supreme Court, including the doctrine recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).
>
> In applying *Burford* abstention, the court does not necessarily consider whether the cause of action is based on state or federal law, but instead looks at whether the plaintiff's claim is entangled in an area of state law that must be untangled before the federal case can proceed. Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are

difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern.

Five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (5) the presence of a special state forum for judicial review. Wilson, 8 F.3d at 314. These factors support the trial court's determination to abstain in the current matter pending resolution of the parallel state proceeding.

Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues. Koerner has alleged that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licensing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is unconstitutional. Whether Koerner has established a non-conforming use of his property is purely a state law issue which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license.

Further, the second, third, and fourth factors recognized by Wilson also favor abstention. Courts have recognized local land use and zoning as areas where

local interest and coherent policy are necessary. *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994), cert. denied, 513 U.S. 870, 115 S. Ct. 192, 130 L. Ed. 2d 125. The court in *Pomponio* stated that federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals.

Finally, the fifth Wilson factor is present in this case. The City of New Orleans, the Board of Zoning Adjustment, and the Louisiana state courts have provided Koerner a forum for his grievances. The City determined in 1997 that Koerner had not achieved a nonconforming commercial use of his property. Thereafter, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed the decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeals. The denial of his non-conforming use was upheld.

The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial court properly rejected this attempt by abstaining to inject the federal courts into such local issues.[5]

The Court held further:

Koerner argues that the trial court's order staying this

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[5] See Appendix A, 5a-8a.

matter was deficient because it did not contain an analysis of the *Burford* abstention doctrine. However, the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state court proceeding were intertwined with the issues presented in this matter. The motion to stay was based solely on *Burford* abstention. Considering the facts of the case and the contents of motion to stay, the trial court's order was sufficient.

B. Affirmance by the Court of Appeals of the Stay Order Under *Burford* Abstention Was Error and Conflicted with Decisions of This Court and Other Circuit Courts of Appeal

The court of appeal erred when it affirmed the district court's order to stay in favor of the state action because the state court issues "are intertwined" with the issues presented in the federal court.[6] The failure of the court of appeal to reverse this decision constituted an error of law and established a conflict with the decisions of the Second Circuit Court of Appeals in *Planned Parenthood of Dutchess-Ulster, inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), the Third Circuit Court of Appeals in *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988), *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), the Fourth Circuit Court of Appeals in *Neufeld v. The City of Baltimore*, 964 F.2d 347, (4th Cir. 1992), *Woods Inn, Inc. v. Howard County*, 124 F.3d 597(4thCir.1997), the Seventh Circuit Court of Appeals in *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), the Ninth Circuit Court of Appeals in *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987) and the decision of the Eleventh Circuit

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[6] See Appendix C, 11a.

Court of Appeals in *Rindley v. Gallagher*, 929 F.2d 1552 (11th Cir. 1991), and this Court's decisions in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

In *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (NOPSI), this Court succinctly reiterated the facts required for *Burford* abstention. Quoting *Colorado River v. United States*, 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), this Court stated that *Burford* abstention is appropriate:

> (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

This Court also held in *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361:

> In NOPSI, however, the Court made clear that the mere presence of complex state administrative processes does not necessarily require abstention, even where there exists a potential for conflict between federal and state law.

The Fifth Circuit correctly referenced the *Burford* requirements but applied them incorrectly. It relied heavily on *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319 (4th Cir. 1994) to hold that the second, third and fourth factors to determine if the *Burford* abstention was warranted were fulfilled. However, even if part of Koerner's allegation as to his prescriptive acquisition of the use of more than 15% of his house as a law office involved the application of the New Orleans Zoning Ordinance, this does not imply that

because there is a zoning issue, *Pomponio* abstention is warranted.

To the contrary is *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), where the court held that the plaintiff's allegation that members of the board used their governmental offices to further an illegal conspiracy to destroy plaintiff's constitutional rights to conduct a legitimate business was not simply a land use case. The court considered the plaintiff's allegations of defamation and an attempt by defendants to persuade financial institutions not to lend to the plaintiff. Distinguishing these allegations from simple matters of land use and development policy (671 F.2d at 748), the court held that:

> It is incumbent upon district courts, faced with a claim arising out of land use questions, to examine the facts carefully to determine what the essence of the claim is. If it is an unlawful conspiracy like the one alleged here, the mere presence of land use issues should not trigger a mechanical decision to abstain. (671 F.2d at 748.)

The *Heritage* court concluded that *Burford* abstention could not apply. As in *Heritage*, Koerner not only alleged that his use of more than 15% of his house as a law office meant that he has established a non-conforming use, but also that he has suffered damages from defamation, from the wrongful criminal and civil proceedings brought against him, from the City's wrongful refusal to issue an occupational license to him and other attorneys legally employed on the premises, and from the failure to assess the real value of his house.

Moreover, the Koerner case does not involve any difficult questions of state law nor would the exercise of federal jurisdiction be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See *Neufeld v. The City of Baltimore*, 964 F.2d 347 (4th Cir. 1992), where Baltimore City notified Neufeld that he had

installed his satellite dish in violation of its zoning laws. In reversing abstention, the court stated:

> The district court did not have before it a case involving difficult questions of state law involving peculiarly local concerns. Moreover, exercising federal jurisdiction would not have disrupted a coherent state policy by subjecting the provisions of the zoning ordinance to varying interpretations. (964 F.2d at 349)

In *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), a local zoning board refused to allow an amateur radio operator to extend the height of his transmission tower. The district court's abstention citing state concerns over land use regulation was reversed:

> [...] a system of land use regulation may be of special interest to a state and a municipality; however, the scheme at hand does not approach the complexity of the one under scrutiny in *Burford*. The issue here is not so technical that it requires the district court to become enmeshed in a highly specialized area inconsistent with resolution of a relatively minor federal concern. Nor will the federal court's decision have a potentially far-reaching effect in the area of land use regulation. In contrast, the federal intrusion is very limited and unlikely to nullify any substantial portion of the regulatory program. (843 F2d at 769)

There were no difficult questions of state law involving peculiarly local concerns before the *Izzo* court. Moreover, exercising federal jurisdiction would not have disrupted a coherent state policy by subjecting the provisions of the zoning ordinance to varying interpretations. (964 F.2d at 350.)

In *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), the court ruled that the district

court was not required to abstain from exercising jurisdiction:

> Indeed, the courts have recognized that land use regulations implicate issues that are primarily of local concern. See *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28, 3 L. Ed. 2d 1058, 79 S. Ct. 1070 (1959) (stating that eminent domain concerns "turn on legislation with much local variation interpreted in local settings"); see also *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1326 (4th Cir.) (en banc) (stating that challenges to state or local zoning or land use laws, "when stripped of the cloak of their federal constitutional claims . . . are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims."), cert. denied, 513 U.S. 870, 130 L. Ed. 2d 125, 115 S. Ct. 192 (1994). However, *Burford* abstention is rarely, if ever, appropriate when "the state law to be applied appears to be settled." *Colorado River*, 424 U.S. at 815. In fact, even in cases involving state land use issues, a district court must not decline jurisdiction where its exercise "would . . . not require the District Court to guess at the resolution of uncertain and difficult issues of state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1959); cf. *Thibodaux*, 360 U.S. at 29.

The *Izzo* court noted further that:

> As we noted above, the second type of *Burford* abstention is appropriate only in those cases in which the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See *Quackenbush*, 517 U.S. at 727. Again, there can be no doubt that the Landmarks Ordinance represents an

> effort by the City of Chicago to establish a coherent policy regarding a matter of substantial public concern- - the preservation of historically and architecturally significant real estate. However, this alone is not enough to warrant abstention.

In order to have this second type of *Burford* abstention, there had to be a special forum in which such claims may be litigated. In this case, the Board of Zoning Adjustment is not such a special forum and the zoning claims other than the non-conforming use of the entire house were not litigated.

In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), the court held that a federal court ruling involving state water and water right policy was not disruptive of state efforts to establish coherent policy with respect to municipal control over water and water rights:

> But the mere involvement of an area of state law which is the subject of detailed regulation does not make abstention appropriate. See 670 F.2d at 817. Our adjudication might possibly create conflict with state law; but the mere potential for conflict, without more, does not warrant abstention either. See *Colorado River Water*, 424 U.S. at 815-16; *Turf Paradise*, 670 F.2d at 820. The question instead is whether such potential conflict would impermissibly impair California's efforts to establish policy regarding the regulation of water and water rights. We answer in the negative. We are called upon to adjudicate the District's federal antitrust claims. The only potential impact on the state arising from federal adjudication of those claims is the limitation of the District to the state courts if it wishes to pursue those claims which are not precluded by state action immunity. That result does not affect in the slightest California's ability to take acts necessary to regulate water and water rights, including measures aimed at

> precluding waste and unreasonable use. The district court thus correctly concluded that *Burford* abstention was inappropriate. (828 F.2d at 517-518)

Here, the zoning ordinance is not complex and its interpretation by the federal court would not have affected the City's ability to have a coherent zoning policy. On the contrary, the parties simply asked for the application of the zoning ordinance.

Other circuits hold that when the state law implicated is not complex and when federal review does not disrupt public policy, *Burford* abstention is inappropriate. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988).

Finally, as stated above in *Heritage Farms,* 671 F.2d at 748, district courts must carefully examine the facts, so that, when there is an abstention, the district court must state that facts upon which its decision is made, a requirement completely ignored here. No factual statement is contained in the district court's order herein.

More importantly, the district court's order contains no statement of analysis of any of the *Burford* abstention requirements. In *United States v. Morros*, 268 F.3d 695 (9th Cir. 2001), it was held that:

> Because the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging," abstention is permissible only in a few "carefully defined" situations with set requirements. We review de novo whether the facts of the instant case conform to these requirements. If they do, we review the district court's decision to abstain for an abuse of

discretion. (268F.3d at 703)

The court of appeal the analyzed the three requirements to see whether abstention was warranted and found that none of these criteria were met in that case (268F.3d at 705). In Koerner's case, the district court did not "carefully define" the situation with an analysis of compliance with the set of requirements.

Also, in *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), the court of appeal stated:

> We review *de novo* whether the requirements for abstention have been met. *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996). When the requirements for abstention are present, we review the district court's decision to abstain for an abuse of discretion. (284 F.3d at 1132)

Likewise, in *Wallis v. Mock*, 2003 U.S. App. LEXIS 12668 (9th Cir. 2003) and in *Pallack v. Homestead Insurance Company*, 2003 U.S. App. LEXIS 7350 (9th Cir. 2003), the court of appeals held that they reviewed *de novo* whether the requirements for abstention had been met.

However, in order to make such a review, a court of appeal can only look at the district court's stated reasons to abstain. Here, not only did the district court not state under which abstention it abstained but it also did not analyze any of the abstention requirements. Accordingly, the Fifth Circuit should have made a *de novo* review of the district court's abstention and not reviewed it for abuse of discretion.

CONCLUSION

For all these reasons, Petitioner requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 24, 2003

Koerner v. The Garden District Association; 78 Fed. Appx. 960; 2003 U.S. App. LEXIS 21739 (5th Cir. 2003)

[*960] REYNALDO G. GARZA, Circuit Judge: n1

n1 Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

In this appeal we review the district court's decision to stay these proceedings pending the resolution of parallel state proceedings. For the following reasons, we affirm the district court's decision. **[*961]**

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Plaintiff - Appellant, Louis R. Koerner, Jr. (hereinafter, "Koerner") purchased the property located at 1204 Jackson Avenue (hereinafter, "1204 Jackson") in the New Orleans' neighborhood known as the Garden District. 1204 Jackson is zoned for residential, non- commercial use, but Koerner uses the house as his law office. The New Orleans Comprehensive Zoning Ordinance states that a home may be used for an occupation, so long as (1) it is carried on by a member of the family residing on premises; (2) no person not a resident is employed; and (2) not more than 15% of the floor area of the dwelling is used for the occupation.

In 1979, the City of New Orleans (hereinafter, "City") cited Koerner for zoning violations at 1204 Jackson. The City alleged that Koerner was using in excess of 15% of the property for the operation of a law practice. In response, Koerner reduced the size of the office space to the 15% maximum.

In 1991, the City again investigated Koerner's use of 1204 Jackson for commercial purposes in violation of the applicable zoning regulations. This investigation was instigated by complaints by Defendants-Appellees, The Garden District Association and Michelle Landrieu (hereinafter, collectively "GDA"). This investigation determined that Koerner was in violation of the zoning ordinances by having non-resident workers employed at 1204 Jackson. The City ordered Koerner to stop his non-conforming use of the property.

In 1997, Koerner applied to the City for a permit to operate a bed and breakfast at 1204 Jackson. Koerner argued that he had acquired a right to a non-conforming use of the property for commercial purposes, based on the failure of the City to act against his violation of the zoning ordinance in regard to the non-resident employees. This application was denied by the City. Koerner appealed the decision to the administrative body established to review zoning issues, the City of New Orleans Board of Zoning Adjustment (hereinafter, "BZA"). The BZA affirmed the decision.

Koerner then filed suit in the Civil District Court for the Parish of Orleans, Civil Action No. 97-15968 (hereinafter, "CDC Zoning Action"), requesting a Writ of Certiorari, Mandamus and Declaratory Judgment, seeking to overturn the BZA's decision. In the CDC Zoning Action, Koerner named only the City of New Orleans as defendant; the GDA was not a party to that proceeding. The state trial court affirmed the BZA's determination. Koerner then appealed the trial court's decision to the Louisiana Fourth Circuit Court of Appeals, which also affirmed. Koerner's application for writ of certiorari was denied by the Louisiana Supreme Court.

Despite the clear holding of the BZA and a final judgment by the state court of appeals, Koerner continued to use 1204 Jackson for prohibited commercial purposes and even expanded the use of the property to include a bed and breakfast.

The City again investigated Koerner's use of his property after complaints from the GDA. During this investigation, City inspectors found that Koerner did not have an occupational license, which is required for attorneys practicing in the City. The City issued a citation for failure to have such a license.

Koerner's commercial use of his property also impacted the tax status of that property. After purchasing 1204 Jackson, Koerner married Jeanne Meade, who owned a house on the next block of Jackson Avenue. In 2000, Betty Jefferson, Assessor for the Fourth Municipal District of the City of New Orleans, investigated whether **[*962]** Koerner was entitled to a homestead exemption on 1204 Jackson. The GDA provided information to Jefferson as part of this investigation. Based on findings that Koerner operated a law office at 1204 Jackson, and that Meade and Koerner resided at 1314 Jackson Avenue, Jefferson determined that Koerner was not entitled to claim a homestead exemption for 1204 Jackson. Jefferson was initially a defendant in this proceeding, but all disputes between her and Koerner were resolved through a consent judgment.

In the present suit, Koerner alleges that the GDA encouraged the City to violate Koerner's civil rights. Koerner alleges that the City's issuance of a citation for his failure to obtain an occupational license and Jefferson's revocation of his homestead exemption for 1204 Jackson were influenced by the GDA.

In September of 2000, the GDA filed a motion to dismiss. The GDA asserted that the Koerner failed to state a cause of action because: (1) the GDA was not state a actor acting "under color of state law"; (2) any actions taken in petitioning the governmental bodies could not be the basis of any liability under the First Amendment pursuant to the Noerr-Pennington Doctrine; and (3) that the court should not exercise its supplemental jurisdiction over the state law claims.

On April 2, 2001, the GDA filed suit in the Civil

District Court for the Parish of Orleans in the matter styled as Garden District Association v. Louis R. Koerner, Jr., C.A. No. 2001-5737 (H)(12) (hereinafter, "GDA Enforcement Action"). The GDA sought an injunction to prohibit Koerner from continuing his use of 1204 Jackson in a manner that violated the Comprehensive Zoning Ordinance.

On December 17, 2001, the trial court granted the GDA's motion to dismiss, ruling that: (1) the GDA is a private actor, and does not act under color of state law; (2) the GDA may levy complaints to the appropriate City departments and officers, report violations and seek enforcement of the laws; (3) all such actions of contact between the GDA and the City are protected by the First Amendment under the Noerr-Pennington Doctrine; and (4) that the court would not exercise its supplemental jurisdiction over the state law claims.

Ignoring the findings of the trial court's ruling, Koerner then filed a motion for leave to file his first amended complaint. Koerner sought to reassert the previously dismissed claims against the GDA and to add new claims seeking injunctive or declaratory relief that he had obtained a non-conforming commercial use of the property. This motion was granted in part and denied in part. The court refused to allow the reassertion of claims against the GDA; however, the court did allow Koerner to add claims for injunctive or declaratory judgment.

On February 24, 2003, during the pretrial conference, the trial court (1) continued the trial without date and (2) requested that the GDA file a motion to stay the matter pending resolution of the GDA Enforcement Action pending in state court.

The GDA filed a motion to stay on February 28, 2003, asserting that the trial court should stay the matter pending resolution of the GDA Enforcement Action pursuant to the Burford Abstention Doctrine. The GDA argued that the issues remaining to be tried were dependant upon the determination

of the issue pending before the state court in the GDA Enforcement Action. On March 27, 2003, the trial court granted the motion to stay. This appeal followed.

II.
STANDARD OF REVIEW

[HN1] We review the district court's determination to abstain for abuse of discretion. **[*963]** *Lipscomb v. The Columbus Municipal Separate School District*, 145 F.3d 238, 242 (5th Cir. 1998).

III.
BURFORD ABSTENTION

The only remaining claims in this matter are: (1) alleged constitutional violations pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance and the citation of Koerner for failing to have the requisite occupational law license; and (2) the City's defenses to those claims. The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding.

Federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and abstention is the exception not the rule. *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993). However, a number of abstention doctrines have been recognized by the Supreme Court, including the doctrine recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

In applying *Burford* abstention, the court does not necessarily consider whether the cause of action is based on state or federal law, but instead looks at whether the plaintiff's claim is entangled in an area of state law that must be untangled before the federal case can proceed. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 795 (5th Cir. 1997). Where

timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 588 (5th Cir. 1994).

Five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (5) the presence of a special state forum for judicial review. *Wilson*, 8 F.3d at 314. These factors support the trial court's determination to abstain in the current matter pending resolution of the parallel state proceeding.

Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues. Koerner has alleged that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licensing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is unconstitutional. Whether Koerner has established a non-conforming use of his property is purely a state law issue which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license.

Further, the second, third, and fourth factors recognized by Wilson also favor abstention. Courts have recognized local land use and zoning as areas where local interest and coherent policy are necessary. *Pomponio v. Fauquier County Bd. of*

Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994), cert. denied, 513 U.S. 870, 115 S. Ct. 192, 130 L. Ed. 2d 125. The court in Pomponio **[*964]**stated that federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals. Id.

Finally, the fifth *Wilson* factor is present in this case. The City of New Orleans, the Board of Zoning Adjustment, and the Louisiana state courts have provided Koerner a forum for his grievances. The City determined in 1997 that Koerner had not achieved a nonconforming commercial use of his property. Thereafter, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed the decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeals. The denial of his non-conforming use was upheld.

The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial court properly rejected this attempt by abstaining to inject the federal courts into such local issues.

IV.
THE TRIAL COURT'S ORDER

Koerner argues that the trial court's order staying this matter was deficient because it did not contain an analysis of the Burford abstention doctrine. However, the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state court proceeding were intertwined with the issues presented in this matter. The motion to stay was based solely on Burford abstention. Considering the facts of the case and the contents of motion to

stay, the trial court's order was sufficient.

V.
CONCLUSION

For the foregoing reasons, we affirm the district court's decision.

APPENDIX B – DENIAL OF PANEL AND EN BANC REHEARING – DECEMBER 16, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 03-30346

LOUIS R. KOERNER, JR. Plaintiff-Appellant

VERSUS

THE GARDEN DISTRICT ASSOCIATION; MICHELLE O. LANDRIEU, PAUL MAY; CITY OF NEW ORLEANS.
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 10/24/03, 5 Cir.,_____ F.3d _____)

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R. APP.P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also

DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C – MINUTE ENTRY MARCH 26, 2003

FILED
U.S.DISTRICT COURT
EASTERN DISTRICT OF LA
2003 MAR 27 AM 9:13
LORETTA G.WHYTE
CLERK

MINUTE ENTRY AFRICK, J.
March 26, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUIS R. KOERNER, JR.	CIVIL ACTION NO. 00-2206
VERSUS	
THE GARDEN DISTRICT ASSOCIATION, ET AL.	SECTION: "I" (3)

This Court is in receipt of defendants' motion to stay the above-captioned case pending a final decision with respect to state court issues that are intertwined with the issues presented to the Court in the above-captioned case. The motion to stay is **GRANTED. IT IS ORDERED** that the above-captioned case is administratively closed reserving the right to either party to file a written motion requesting that the above-captioned case be reopened within 30 days following the issuance of a final judgment by the state courts.

DATE OF ENTRY
MAR 27 2003

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX D – ORDINANCES AND STATUTES

COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF NEW ORLEANS

Section 4.8.1 Purpose of the District.

The RM-1 Multiple-Family Residential District is intended to maintain low-medium residential densities as might be appropriate for garden apartment developments in outlying areas, and, at the same time, to permit a variety of housing types. Population density and height of buildings are low enough to be generally compatible with single-family residential development in the same general neighborhood. Permitted community facilities are the same as for the single-family residential districts.

Section 4.8.3 Permitted Uses.

The following uses of land are authorized as permitted uses in the RM-1 Multiple-Family Residential District except that timeshare buildings and transient vacation rentals are prohibited:

1. Any permitted use authorized in the RS-1 Single-Family Residential District.

2. Two-family dwellings.* (See Section 11.33)

3. Town houses.* (See Section 11.33)

4. Multiple-family dwellings.

5. Homes for the aged, nursing homes, convalescent homes and orphans homes.

6. Convents and monasteries.

Section 4.1.3 Permitted Uses.

The following uses of land are authorized as permitted uses within the RS-1 Single-Family Residential District, except that timeshare buildings and transient vacation rentals are prohibited:

2. Home occupations, provided such use does not occupy more than fifteen (15) percent of the floor area of the dwelling unit.

99. Home Occupation. Any occupation within a dwelling and clearly incidental thereto, carried on by a member of the family residing on the premises provided that no person not a resident of the premises is employed, that not more than fifteen (15) percent of the floor area of the dwelling is used for the home occupation, and no stock in trade is kept or commodities sold, no mechanical equipment is used except such that is normally used for family, domestic, or household purposes, and there is no exterior indication other than a sign permitted by the district regulations, that the building is being used for any purpose other than a dwelling. When within the above requirements, a home occupation includes but is not limited to the following: (a) art studio; (b) dressmaking; (c) professional office of a lawyer, engineer, architect, accountant, salesman, real estate agent, insurance agent, or other similar occupations; (d) teaching, with musical instruction limited to not more than two (2) pupils at a time; however, a home occupation shall not be interpreted to include barber shops, beauty parlors, restaurants, or office of a physician or dentist where mechanical equipment is used.

LOUISIANA REVISED STATUTES

LSA-R.S. 9:5625. Violation of zoning restriction, building restriction, or subdivision regulation

A.(1) **All actions civil or criminal**, created by statute, ordinance, or otherwise, except those actions created for the purpose of amortization of nonconforming signs and billboards

enacted in conformity with the provisions of R.S. 33:4722, **which may be brought** by parishes, municipalities, or their instrumentalities or by any person, firm, or corporation **to require enforcement of and compliance with any zoning restriction**, building restriction, or subdivision regulation, imposed by any parish, municipality, or an instrumentality thereof, and based upon the violation by any person, firm, or corporation of such restriction or regulation, **must be brought within five years from the first act constituting the commission of the violation.**[7]

(2) Where a violation has existed for a period of two years prior to August 1, 1956, except those actions created for the purpose of amortization of nonconforming signs and billboards enacted in conformity with the provisions of R.S. 33:4722, the action must be brought within one year from and after August 1, 1956.

(3) With reference to violations of use regulations all such actions, civil or criminal, except those actions created for the purpose of amortization of nonconforming signs and billboards in conformity with the provisions of R.S. 33:4722, must be brought within five years from the date the parish, municipality, and the properly authorized instrumentality or agency thereof if such agency has been designated, first had been actually notified in writing of such violation.

(4) Except as relates to nonconforming signs and billboards, any prescription heretofore accrued by the passage of two years shall not be interrupted, disturbed, or lost by operation of the provisions of this Section.

---

[7] This was amended effective July of 1997 to extend the period from two years to five years, but to protect any non-conforming use that had already accrued under the two-year prescriptive period.